

THE STATE
versus
WINSTON SHAYAWABAYA
and
NGONI TSIGA

HIGH COURT OF ZIMBABWE
CHITAPI & WAMAMBO JJ
HARARE, 4 October 2018

Review judgment

CHITAPI J: The two accused persons were convicted of the offence of “unlawful entry into premises in aggravating circumstances as defined in s 131 (2) (a) (b) of the Criminal Law (Codification & Reform) Act, [*Chapter 9:23*]” by the senior magistrate at Harare on 6 April, 2018. They were each sentenced as follows

“49 months imprisonment of which 24 months is suspended for 3 years on condition accused does not within that period commit any offence involving unlawful entry and dishonesty for which he is sentenced to imprisonment without the option of a fine. Of the remaining 24 months imprisonment 1 month imprisonment is suspended on condition accused restitutes the complainant Patrick Pfupajena in the sum of \$53.00 through Clerk of Court Harare on or before 6 May, 2018.”

Both accused persons had pleaded guilty to the charge. The facts admitted by the accused and from which the charge was grounded were briefly as follows; The accused are aged 32 and 25 years respectively. They are residents of Epworth suburb, Harare. They are not related to the complainant. On 2 April, 2018 around midnight, the complainant who was at his house in Zimre Park, Harare retired to bed after securing the premises by closing all the windows and doors. In the course of the night, the two accused unlawfully gained entry into the complainant’s house. They claimed to have used a garden hoe to open the door and gain access into the complainant’s house. Whilst inside the house, the two accused proceeded into the kitchen from where they stole various grocery items. The accused persons went away unnoticed. They sold part of the loot and this led to their arrest after police recovered part of the stolen items from the 1st accused’s girlfriend following a tip off. The first accused person voluntarily made indications leading to the recovery of property valued at \$143-00. The admitted facts indicate that the total value of the stolen property was \$250-00. The prejudice

was therefore \$107.00. The magistrate must have divided that amount in half and come up with the restitution of \$53.00 referred to in the sentence.

The conviction is largely proper although more needed to be canvassed as will become apparent upon a reading of this review judgment. I have carefully considered the sentence which was imposed by the magistrate. It needs to be revisited on review because it does not show that the senior magistrate properly applied his or her mind to the process of properly determining the sentence. The consequence of such failure by the magistrate results in the sentence not being certifiable by a judge of this court as being in accordance with real and substantial justice.

The process of sentence is pre-eminently the function and prerogative of the trial court. This principle is trite but not absolute because the trial court's prerogative or discretion will be interfered with by this court on appeal or review using the powers granted by s 171 (1) (b) and (d) of the Constitution of Zimbabwe (2013) as read with, in case of a review as obtains in this case, s 57 of the Magistrates Court Act, [*Chapter 7:10*] and s 29 of the High Court Act, [*Chapter 7:06*].

As a guide to assessing sentence, when dealing with a charge of unlawful entry committed in aggravating circumstances, it is important for the magistracy to always bear in mind that the determination of whether or not an unlawful entry has been committed in aggravating circumstances is an issue of both law and fact. It is an issue of law in that the law in s 131 (2) lists the five factors which are determinant of the issue. Further, the presence of any one of the factors qualifies the unlawful entry as having been committed in aggravating circumstances. The factual side of the issue arises from the fact that the trial court is required to make factual findings on whether or not any one or more of the 5 factors have been proved to be present. Evidence must therefore be led in the usual manner including through seeking admissions from the accused person in terms of s 314 of the Criminal Procedure and Evidence in proof of the aggravating factors aforesaid.

For the avoidance of doubt, an unlawful entry into premises is, as provided for in s 131 (2) of the Criminal Law (Codification and Reform Act) Act, committed in aggravating circumstances where the convicted person

- (a) entered a dwelling-house; or
- (b) knew there were people present in the premises; or
- (c) carried a weapon; or

- (d) used violence against any person, or damaged or destroyed any property, in effecting entry; or
- (e) committed or intended to commit some other crime.

The 5 factors are disjunctive. The presence of more than one of them in any given case should be treated as a factor which aggravates sentence. In order that there is clarity of distinction as to whether the unlawful entry has been committed in circumstances of aggravatory or not, I suggest that the particulars of aggravation should be listed in the charge or state outline. An unrepresented accused should be advised of the relevance of the distinction so that the accused appreciates that he faces a more severe penalty if any of the factors of aggravation are proven to be present. The state must prove the listed factors of aggravation and the accused has a right to challenge the existence of the factors. Where the accused challenges the factors, they must be proved by the State in the usual manner through evidence.

In canvassing the essential elements of the offence, the magistrate did not ask questions relevant to the determination of the existence of aggravating circumstances. Although the summary jurisdiction or charge sheet in its heading is headed “Unlawful Entry in aggravating circumstances as defined in s 131 (2) (a) (b) (e) of the Criminal Law (Codification and Reform) Act, [Chapter 9:23.”, This hardly informs an accused person of the gravamen of the charge. Section 131 (2) does not in any event create the offence of unlawful entry. The offence is created by section 131 (1). I suggest that the correct framing of the charge should have been as follows:

“Unlawful Entry Into Premises in aggravating circumstances as defined in s 13 (1) (a) as read with s 131 (2), (a), (b) and (e) of the Criminal Law (Codification & Reform Act) Chapter 9:23. In that (details of the charge and the aggravating circumstances charged are then listed).”

In casu, the magistrate only enquired of the accused persons as to how they gained entry and to confirm the commission of the further offence of theft. The fact that the premises is a dwelling house should have been canvassed because it is not a given or common cause fact that a premises is a dwelling house. The definition of premises given in s 130 of the Criminal Law (Codification & Reform) Act is;

“premises” means any movable or immovable building or structure which is used for human habitation or for storage, and includes an outbuilding; a shed, a caravan, a boat or tent.”

A dwelling house is not defined. The use of the term implies that the house will be under occupation or intended for human habitation and is thus covered by the word “premises”.

It should have been advisable to confirm with the accused persons that they admitted or that the premises which they unlawfully entered was a dwelling house in the sense that there was a person or people in occupation of the house or that they knew that the house was in existence for use as a dwelling.

It will be noted that despite the observations and directions I have given for future guidance; I indicated that the conviction was largely proper. There was no substantial miscarriage of justice, which resulted from the omissions I have addressed because the accused persons admitted when essential elements were put to them that they used a hoe which is a weapon to effect entry by forcing the door to the premises open. They also admitted stealing the groceries listed in the charge sheet. To the extent that the proof or existence of just one of the factors listed in s 131 (2) is sufficient to found aggravating circumstances, the conviction must stand.

I expressed my reservations on sentence. In terms of s 51 (3) of the Magistrate Court Act, every magistrate despite his or her rank is given special jurisdiction to impose any of the sentences provided under s 131 (a) or (b) of the Criminal Law Codification and Reform Act. The extended jurisdiction does not imply that in every case, the magistrate should feel compelled to exceed his or her ordinary jurisdiction. I say so because the provisions of s 131 (a) and (b) do not provide for the imposition of mandatory penalties. What the section implies is that any magistrate may in a case where the facts warrant, exercise jurisdiction beyond his or her ordinary jurisdiction to the extent of the limits provided for in ss 131 (a) and (b) which for the avoidance of doubt provide as follows –

“131 Unlawful entry into premises

(1) Any person who, intentionally and without permission or authority from the lawful occupier of the premises concerned, or without other lawful authority, enters the premises shall be guilty of unlawful entry into premises and liable–

- (a) to a fine not exceeding level thirteen or not exceeding twice the value of any property stolen, destroyed or damaged by the person as a result of the crime, whichever is the greater, of imprisonment for a period not exceeding fifteen years, or both, if the crime was committed in any one or more of the aggravating circumstances set out in subs (2); or
- (b) in any other case, to a fine not exceeding level ten or not exceeding twice the value of any property destroyed or damaged by the person as a result of the crime, whichever is the greater, or imprisonment for a period not exceeding ten years, or both.

Reverting to the sentence imposed by the senior magistrate, apart from the sentence being arrived at without strict consideration of the aggravating circumstances, the overall sentence of 48 months (4 years) in the circumstances of the case is so severe and disparate from

the sentences imposed in more or less similar or more severe cases. Without abrogating the trite position that the trial court must be left at large to determine sentence, where it imposes a sentence which is so far removed in severity from what would have been imposed by the review or appeal court, to the extent that the sentence imposed invokes a sense of shock, such a sentence cannot be said to accord with the principle of real and substantial justice. The sentence in such a case should be interfered with.

In *casu*, the magistrate did acknowledge that the accused persons were first offenders who pleaded guilty. The magistrate also considered that the use of a weapon to gain entry had the potential that it could be used to harm the occupant of the premises. It is however a fact that the weapon was not used. There was no alleged or proven damage to the premises or any property. In all the circumstances, the accused persons were just petty thieves who stole groceries (food) beer, and other items like 2 small 3 kg gas tanks, a duvet and cooler bag. They did not ransack the premises. The loss to the victim was \$107.00.

The senior magistrate did not apply his or her mind to the alternative sentence options provided for in s 131 (1) (b) for the offence of unlawful entry into premises in aggravating circumstances. A fine not exceeding level ten or not exceeding twice the value of any stolen damaged or destroyed property are options provided for as adequate punishment apart from imprisonment or in addition to imprisonment. The magistrate did not indicate or give reasons why the alternative options could not have provided adequate punishment.

The magistrate ordered restitution of \$53.00 against each accused person. I assume that the order for restitution was made in terms of s 365 of the Criminal Procedure and Evidence Act [Chapter 9:07]. The provisions of this section should be complied with. The section provides as follows:

“365 Restitution of unlawfully obtained property

- (1) Subject to this Part, a court which has convicted a person of an offence involving the unlawful obtaining of property of any description may order the property to be restored to its owner or the person entitled to possess it.
- (2) For the purposes of subs (1), where the property referred to in that subsection consists of—
 - (a) Money, the court may order that an equivalent amount be paid to the injured party from moneys—
 - (i) taken from the convicted person on his arrest or search in terms of any law; or
 - (ii) held in any account kept by the convicted person with a bank, building society or similar institution; or
 - (iii) otherwise in the possession or under the control of the convicted person;

- (b) fungibles other than money, the court may order that an equivalent amount or quantity be handed over to the injured party from similar fungibles in the possession or under the control of the convicted person.”

A court may therefore order restitution by ordering a restoration to the owner or possessor of property lost or taken away from such person through the commission of an offence. If property consists of money, an order for an equivalent amount to be paid to the injured party can be made. Such money can be taken from money recovered from the convict on arrest or search or as such convict might hold in a bank or similar financial institution. In respect of fungibles, the court may order that similar fungibles in the possession or under the control of the convicted person are taken away from such accused and given to the owner. Section 365 must be read together with s 366 which gives guidelines on what further considerations should be taken into account when making an order of restitution. Section 366 reads as follows:

“366 Cases where award or order not to be made

- (1) A court shall not award compensation in terms of s *three hundred and sixty-two, three hundred and sixty-three or three hundred and sixty-four* –
- (a) in respect of any loss or diminution of a right or personal injury where such loss, diminution or injury results from an accident arising out of the presence of a vehicle on a road, unless in the case of loss or diminution of a right it arises from damage that is treated by para (b) of subs (2) of s *three hundred and sixty-two* as resulting from theft;
- (b) in respect of any loss or diminution of a right or personal injury–
- (i) where the amount of compensation due to the injured party is not readily quantifiable; or
- (ii) where the full extent of the convicted person’s liability to pay the compensation is not readily ascertainable; or
- (ii) unless the court is satisfied that the convicted person will suffer no prejudice as a result of the claim for compensation or restitution, as the case may be, being dealt with in terms of this Part.
- (3) A court shall not order the restitution of any property in terms of s *three hundred and sixty-five* if it appears to the court that another person, who had no knowledge that the property had been unlawfully obtained, has acquired a right or interest in the property which might be prejudiced if the property were restored to its own or to the person entitled to possess it.”

In *casu*, it is not clear what the magistrate considered in making the order of restitution. Such an order should not be based on a simple allegation by the state on the values of the property stolen or recovered. At best the accused should be asked whether he admits the extent of the loss as expressed in monetary terms. This was not done in this case.

Another striking feature of the sentence imposed on the accused persons was the length of the suspended term of 24 months (2 years) for good behaviour. Of the 24 months, 1 month

was suspended on condition of restitution of \$53.00 for each accused leaving an effective sentence of 23 months. The 24 months suspended on condition of good behaviour were suspended for 3 years. If the intention is that the accused persons should be good citizens in future to avoid serving the suspended term, the 3 year period of suspension presents itself as very short. It would normally be justified for shorter suspended sentences and also in relation to offences which are unlikely to be repeated. For crimes of dishonesty or against the person where the offender will reintegrate into society and mix and mingle with other citizenry, the suspended sentence should in my view be fixed at the maximum of 5 years to protect members of society by dissuading the accused person through the sentence hanging over him or her to behave good.

Lastly, I have indicated that the sentence imposed is under the circumstances shockingly excessive. A comparison can be made with a few cases where lesser sentences were imposed for more or less similar or more serious cases and the sentences certified on review by this court: *S v Felix Phiri* HH 116/15; *S v Felix Mtetwa* HH 112/15; *Dennis Dube* HB 78/11; *S v Panashe Tagwireyi* HH 47/18.

Under the circumstances, following on the finding that there are grounds to interfere with the sentence imposed on review, the sentence imposed on both accused is set aside and substituted with the following sentence.

Each accused: 12 months imprisonment of which 6 months imprisonment is suspended for 5 years on condition that within that period the accused is not convicted of any offence involving unlawful entry or theft for which upon conviction the accused is sentenced to imprisonment without the option of a fine.

WAMAMBO J agrees